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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 483

JOHN J. CASALE, INC.,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI

The petitioner, *John J. Casale, Inc.,* respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled cause on October 3, 1949.

Opinion Below

The opinion of the Court of Claims (R. 33-41) has not yet been reported.

Jurisdiction

The judgment of the Court was entered as of October 3, 1949. (R. 41) A motion for a new trial, seasonably filed, was denied on November 7, 1949. (R. 42) The jurisdiction

of the Court is invoked under the provisions of Section 3(b) of the Act of 1925, 43 Stat. 939, as amended.

Statute Involved

Section 3475 of the Internal Revenue Code (56 Stat. 979, Title 26 of the USC, Sec. 3475) provides that:

> "(a) There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation * * * of property, * * * by * * * motor vehicles, * * * a tax equal to 3 per centum of the amounts so paid. * * * Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person. * * *"

Questions Presented

1. Whether petitioner, who has for many years engaged at all times in the business of leasing trucks to mercantile establishments on long-term leases for use by the latter under their absolute control in picking up and delivering only their own goods, are "*persons engaged in the business of transporting property for hire*", within the scope and meaning of Section 3475, Title 26 of U. S. C., supra, solely by reason of fact that, with respect to approximately 14 per cent of its trucks, petitioner provides, as an accommodation, drivers for the trucks while transporting lessees' merchandise, without cost to petitioner, on a non-profit basis?

2. Whether, by merely furnishing drivers for approximately 14 per cent of its trucks, without cost to petitioner, petitioner has converted its sole business of leasing trucks into a business of "transporting property for hire" within the language of Section 3475, Title 26, U. S. C., even though the Internal Revenue Department ruled that the leasing of

trucks by petitioner, without the drivers—which comprises about 86 percent of its petitioner's business—does not constitute the "transportation of property for hire" under the above Act?

3. Whether the Court may enlarge the Act, Sec. 3475, supra, beyond the clear import of its language and hold that petitioner is a transporter of property for hire, when in fact it transports no property?

Statement

Petitioner adopts as its STATEMENT the following opening statement of the Court of Claims and its SPECIAL FINDINGS OF FACT:

"In this suit plaintiff seeks to recover $152.49 representing a 3 percent tax of $132.59, plus penalty and interest, for the period December 18 to 31, 1945, assessed and collected under the Revenue Act of October 21, 1942 (26 U. S. C. 3475), on $4,419.71 alleged by defendant to have been received by plaintiff for the transportation by it of property for hire. Plaintiff insists that it was not engaged in the business of transporting property for hire but was engaged in leasing trucks to commercial concerns for their use and as to the 14 percent of its trucks with respect to which the tax in question was exacted, it hired through contracts with the Unions the drivers or chauffeurs therefor as an accommodation or as employment agent for the lessees of the trucks."

The SPECIAL FINDINGS OF FACT of the Court of Claims (R. 33-38) are as follows:

"1. The plaintiff is a Delaware corporation, with its principal place of business at 510 West 21st Street, New York, New York.

"2. Plaintiff is engaged in the business of owning and leasing trucks to various business firms in and near the

city of New York. At present it owns approximately 1,300 trucks which it leases to some 80 customers. To 27 of such customers, including those listed on page eight of the petition, it furnishes chauffeurs as well as trucks.

"3. During 1945 plaintiff was furnishing trucks and drivers to certain business firms including those listed on page eight of the petition. From December 18, 1945, to December 31, 1945, inclusive, said listed concerns paid to plaintiff the aggregate amount of $4,419.71 for services of the plaintiff's trucks and the drivers furnished. The Commissioner of Internal Revenue determined that a 3% transportation of property tax in the amount of $132.59 imposed by Section 3475 of the Internal Revenue Act should be collected by plaintiff under such receipts. On the ground that it was not liable under the terms of the statute plaintiff failed and refused to make the collection or pay the transportation tax to the Collector of Internal Revenue.

"4. In February 1946 there was assessed against plaintiff, by reason of its refusal and failure to collect the amount for the transportation of property tax on payments made to it in the said period December 18 to December 31, 1945, for the services of its trucks and drivers, a 100% penalty tax under the provisions of Sec. 1718 (c) of the Internal Revenue Act made applicable to transportation of property taxes by Section 3475 of the Internal Revenue Act. Notice and demand for payment of the amount of the tax was forwarded to plaintiff early in April 1946. A warrant for distraint was issued. September 16, 1947, plaintiff paid the penalty tax of $132.59 together with 5% penalty for late payment amounting to $6.63 and interest of $13.27, a total of $152.49.

"5. On or immediately after September 16, 1947, plaintiff filed claim for refund of the said $152.49 on the ground

that it was not engaged in transportation of property as a carrier and that to hold that the furnishing of drivers with its trucks subjected it to the transportation of property tax was arbitrary. The claim was rejected by letter dated April 12, 1948.

"6. Plaintiff sues to recover said sum of $152.49 on the ground that it is not engaged in the transportation of property as a carrier either generally or specifically as to the customers upon whose payments the assessment was made.

"7. Plaintiff's dealings with its customers are covered by written contracts with each customer defining fully the duties and obligations of both plaintiff and the customer. The contracts for the period involved with the concerns listed on page eight of the petition are filed herein as Plaintiff's Exhibits 1 to 8, inclusive, and are incorporated herein by reference.

"There has been no insistence by the Commissioner of Internal Revenue that the relationship created by said written contracts in and of itself and without the furnishing of chauffeurs by plaintiff constitutes plaintiff a transporter of property as a carrier.

"8. Where plaintiff furnishes to the customer a chauffeur there is appended to the written contract Schedule 'B' defining such relationship. Schedule 'B' for six of the concerns involved is in substantially the following words and figures:

> "The Lessor agrees to provide chauffeurs (and helpers if required) for all vehicles leased under this agreement and all clauses otherwise in this agreement referring to 'Lessee's Chauffeurs' etc. shall be deemed amended to read and mean 'Lessor's Chauffeurs' etc.
>
> "The Lessor agrees to pay the wages of such chauffeurs and helpers at the union wage scale or scales prevailing at any time this Schedule may be in force.

The Lessor will also pay any and all contributions or taxes for Unemployment Insurance and for Old Age Benefits now in effect or hereafter in effect which may be imposed by the United States or State Government or Governments which may be measured by wages, salary or other remuneration paid to such employees. The Lessor shall also be liable solely and fully for the expense of Workmen's Compensation Insurance and will, upon request, furnish satisfactory evidence that such compensation insurance is duly provided for as required by law.

"At all times when the said motor vehicle or vehicles are in the service of the Lessee and notwithstanding any chauffeur or helper shall be provided by the Lessor, the operation of the said vehicle or vehicles including the activities of such employees shall be under the sole direction and control of the Lessee.

"The Lessee herewith agrees to hold the Lessor harmless for the following acts of such employees:

"A. Breakage, damage, spoilage, loss or theft of merchandise, including improper or erroneous delivery thereof;

"B. Damage resulting from installation of merchandise or to property at the place of delivery or pick-up thereof;

"C. The Lessor assumes no liability or responsibility for any cash, checks or funds entrusted to any such employees and the safety of same shall be solely the responsibility of the Lessee, whether such cash, checks or funds are in the actual possession of such employees or whether such employees temporarily deposit the same for safekeeping with any one or in any place of storage provided by the Lessor, it being understood that such place of storage, if provided, shall be solely for the convenience and accommodation of the Lessee, without any compensation being paid therefor.

"Upon receipt of a written compaint from the Lessee specifying any reckless, careless or abusive handling

of a vehicle or any other incompetence of any such chauffeur or helper the Lessor shall remove such chauffeur or helper and substitute a competent one in his place.

"Inability on the part of the Lessor to provide chauffeurs and/or helpers required shall in no wise vitiate this agreement nor shall the Lessor incur any liability for such failure to provide.

"In consideration of the provisions of this Schedule the Lessee agrees to pay to the Lessor separately and in addition to the rental provided in Schedule 'A' of this agreement an amount equal to the wages paid by the Lessor to such chauffeurs (and helpers if required) plus 8 per cent thereof, such separate and additional compensation to be paid by the Lessee to the Lessor weekly. If, however, at any time when this Schedule shall be in force, there shall occur an increase or reduction, as compared with the date of this agreement in the required rate of contributions of taxes payable by the Lessor for Unemployment Insurance and for Old Age Benefits referred to hereinabove, the amount of this separate and additional compensation to be paid by the Lessee to the Lessor shall be reduced or increased, as the case may be, substantially in the same amount as such operating expenses of the Lessor are so reduced or increased on that account.

"9. For two of the customers whose contracts were executed at an earlier date, a schedule similar to Schedule 'B' but in a slightly shorter form was used, in words and figures as shown by Plaintiff's Exhibits Nos. 2 and 7, to which reference is made.

"10. It has not been the practice to furnish any helpers. Where goods are too heavy or bulky for a driver to handle alone the customer usually sends two trucks with chauffeurs who help each other.

"11. In practice the chauffeurs furnished by plaintiffs to its customers are carried on plaintiff's pay roll and are paid

by plaintiff. The trucks which it furnishes to its various customers are of the kinds and capacities required by the customers in their business and bear the customers' marking and not those of the plaintiff. Where the chauffeurs are furnished by the plaintiff, they wear the uniforms of the customers.

"12. In order to service its trucks and house them plaintiff maintains, at locations in and around the city of New York, convenient to the customers it serves, 32 garages. Except in special instances the trucks are returned at night to plaintiff's garages.

"Where chauffeurs are furnished, they are carried on plaintiff's pay roll and are paid by plaintiff. Their time is measured by time clocks in plaintiff's garages from the time the trucks and chauffeurs leave until the chauffeurs return the trucks. The amounts so paid to such chauffeurs are then billed to the customers with the addition of the percentage specified in Schedule 'B'.

"13. For the most part the chauffeurs employed by plaintiff and furnished to its customers were formerly employed by the respective customers. All of them are subject to the jurisdiction of unions. These unions contract with plaintiff as the employer of such chauffeurs with reference to their pay scales and other conditions of their employment. However, in said contracts the customer is referred to by name and the union having jurisdiction is determined by the nature of the customer's business and its location. The contracts between plaintiff and the unions, having jurisdiction of the concerns listed in the petition, are filed herewith as Plaintiff's Exhibits Nos. 9 to 16 inclusive, and are incorporated herein by reference. Seniority of employees is dependent upon their connection with the customer's business.

"14. The chauffeurs employed by plaintiff are given a physical examination and if necessary are instructed in matters requisite to their obtaining licenses as chauffeurs. They are given no written instructions or general orders by the plaintiff as to the performance of any duties in plaintiff's interest while under the direction of plaintiff's customers. As a matter of practice the duration of their tour of duty with the customer and the duties performed for such customer are the customer's sole concern and no report of such activities is made to the plaintiff.

"15. Plaintiff is registered with the New York State Unemployment Office as the employer of the chauffeurs furnished to its customers.

"16. Plaintiff has not been licensed to transport property for hire by any Governmental Agency, State or Federal.

Specifications of Errors to Be Urged

The Court of Claims erred:

1. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that Plaintiff (petitioner) is not entitled to recover, and its petition is therefore dismissed, and that plaintiff was in effect a transporter of property for hire.

2. In attempting to change the clear import of the language of the Transportation Act, Section 3475, Title 26, U. S. C., supra, contrary to the decision of this Court and the United States Courts of Appeal.

3. In failing to hold that petitioner was not engaged in transporting property for hire.

4. In failing to hold that petitioner is not liable for the three per cent transportation tax.

5. In dismissing petitioner's petition.

Reasons for Granting Writ

1. The Court below has decided important questions of a federal law, involving the Transportation Act, which is opposed even by the Treasury Department, the Department of Agriculture and the Interstate Commerce Commission, as being against the interest of the public, which has not been, but should be settled by this Court.

2. The Court's ultimate finding and judgment is contrary to its "Special Findings of Fact."

The Court below in its *Special Findings of Fact* found that petitioner "is engaged in the business of owning and leasing trucks" (Fdg. 2, R. 34), *but held,* in contradiction of said finding, that petitioner is subject to the Transportation Tax Act, 26 U. S. C. A. Section 3475, supra (R. 40, 41) even though that Act provides that—

> "• • • Such tax shall apply *only* to amounts paid to a person engaged in the business of transporting property for hire, • • •."

Thus, the Court of Claims' contrary findings of ultimate fact and judgment are not sustainable "in point of law". (*United States v. Esnault-Pelterie,* 299 U. S. 201, 205-206; 303 U. S. 26, 31; *U. S.* v. *Penn Foundry and Mfg. Co.,* 337 U. S. 198).[1]

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[1] "We are bound by the foregoing findings in testing the Court's conclusions of law and judgment • • •". 337 U. S. 198, 93 L. ed. at page 998, headnote 2. Counsel for the petitioner herein represented the respondent in the *Penn Foundry* Case. Certiorari was granted over the strenuous objection of counsel; then followed the decision, 337 U. S. 198, by this Court, reversing the Court of Claims, mainly on the ground that the court's ultimate findings and judgment were inconsistent with and contradictory of its findings. By the same token, with our positions in reverse we respectfully urge that this Court should grant our petition in the instant case by applying the principles enunciated against us, in the *Penn Foundry* Case.

The Court below in its Special Findings of Fact (R. 33-38) made no finding of fact that petitioner "is engaged in the business of transporting property for hire", as petitioner transports no property. On the contrary, it found that petitioner "is engaged in the business of owning and leasing trucks" (Fdg. 2, R. 34). The Court in Finding 7, (R. 35) adopted as part of its Special Findings of Fact, the *contracts* between petitioner and its lessees, filed as "Plaintiff's Exhibits 1 to 8, inclusive." Those contracts (a sample of which is attached to the petition, (R. 28-32) are long-term Contracts covering a period of two years or more, and provide:

> "At all times when the said motor vehicle or vehicles are in service of the Lessee and notwithstanding any chauffeur or helper shall be provided by the Lessor, the operation of the said vehicle or vehicles including the activities of such employees shall be under the sole direction and control of the Lessee." (R. 32)
>
> "The Lessee herewith agrees to hold the Lessor harmless for the following acts of such employees:
>
> "(a) Breakage, damage, spoilage, loss or theft of merchandise including improper or erroneous delivery thereof;
>
> "(b) Damage resulting from installation of merchandise or property at the place of delivery or pick-up thereof;
>
> "(c) The lessor assumes no liability or responsibility for any cash, checks or funds entrusted to any such employees and the safety of same shall be solely the responsibility of the Lessee, whether such cash, checks or funds are in the actual possession of such employees or whether such employees temporarily deposit the same for safekeeping with any one or in any place of storage provided by the Lessor, it being understood that such place of storage, if provided, shall be solely for the convenience and accommodation of the Lessee, without any compensation being paid therefor." (R. 32)

"Upon receipt of a written complaint from the Lessee specifying any reckless, careless or abusive handling of a vehicle or any other incompetence of any such chauffeur or helper the Lessor shall remove such chauffeur or helper and substitute a competent one in his place." (R. 32)

"Inability on the part of the Lessor to provide chauffeurs and/or helpers required shall in no wise vitiate this agreement nor shall the Lessor incur any liability for such failure to provide." (R. 32)

"In consideration of the provisions of this Schedule the Lessee agrees to pay to the Lessor separately and in addition to the rental provided in Schedule "A" of this agreement an amount equal to the wages paid by the Lessor to such chauffeurs (and helpers if required) plus 8 per cent thereof, such separate and additional compensation to be paid by the Lessee to the Lessor weekly. If, however, at any time when this Schedule shall be in force, there shall occur an increase or reduction, as compared with the date of this agreement in the required rate of contributions or taxes payable by the Lessor for Unemployment Insurance and for Old Age Benefits referred to hereinabove the amount of this separate and additional compensation to be paid by the Lessee to the Lessor shall be reduced or increased, as the case may be, substantially in the same amount as such operating expenses of the Lessor are so reduced or increased on that account." (R. 32)

The Court found (Fdg. 7, R. 35) that the Commissioner of Internal Revenue made no claim that petitioner "*was engaged in the business of transporting property for hire*" where it furnished no drivers as an accommodation for its Lessees, which represented 56 of its 80 customers, or 86 per cent of all drivers (R. 33, 34).

The Court then found that—

"It has not been the practice to furnish any helpers, where goods were too heavy or bulky for a driver to handle alone, the customer usually sends two trucks

with chauffeurs who help each other" (Fdg. 10, R. 37).

"The trucks which it furnishes to its various customers are of the kind and capacities required by the customers in their business and *bear the customer's marking and not those of the plaintiff. Where the chauffeurs are furnished plaintiff, they wear the uniforms of the customers*" (Fdg. 11, R. 37).

The chauffeurs employed by petitioner for the lessees

"* * * *are given no written instructions or general orders by the plaintiff as to the performance of any duties in plaintiff's interest while under the direction of plaintiff's customers.* As a matter of practice the duration of their tour of duty with the customer and the duties performed for such customer are the customer's *sole* concern and no report of such activities is made to the plaintiff, (Fdg. 14, R. 38) and that plaintiff has not been licensed to transport property for hire by any government agency, state or federal" (Fdg. 16, R. 38).

The Court's opinion—but not its findings (cf. *U. S.* v. *Esuault-Pelterie*, 299 U. S. 201, 206; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 422; *U. S.* v. *Causby*, 328 U. S. 256, 267; *U. S.* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198)[2] marshals in support of the judgment dismissing the petition, mainly its statement in the opinion contrary to its Special Findings of Facts that "(a) the drivers furnished to customers with plaintiff's trucks were plaintiff's employees and the custodian of its property while the trucks were in use on business of the customers; (b) that plaintiff had the exclusive right limited only by the terms of its contracts with the unions, to hire and discharge drivers of the trucks, and it

[2] A Court of Claims judgment "may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover." 299 U. S. at 422.

also had, at all times, the general right of direction and control of its trucks and drivers, and (c) that the plaintiff's activities and business bring it within the spirit and purpose of the taxing statute, and that the amount paid to said plaintiff was an amount paid for the transportation of property by plaintiff for hire, and (d) that such services rendered by plaintiff to such customers were substantially those of a contract carrier engaged in the business of transporting property for hire by motor vehicle (Ct's Op. R. 40, 41).

The above statements in the opinion are in conflict with its Special Findings of Fact, and as a matter of law, with the opinions of this Court, *supra*.

3. The Court, in holding that petitioner is a transporter of property for hire, where in fact it transports no property, changes and extends by implication the clear and unambiguous language of Section 3475 of the Internal Revenue Code, contrary to the decisions of this court.[3] (*Iselin* v. *U. S.*, 270

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[3] Here, as stated in *Iselin* v. *U. S.*, 270 U. S. 245—

> "The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed and the incidence of the tax, were specified, preclude an extension of any provision *by implication* to any other subject. The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within the scope. To supply omissions transcends the judicial function. Compare *United States* v. *Weitzel*, 246 U. S. 533, 543, 62 L. ed. 872, 874, 38 Sup. Ct. Rep. 381; *Peoria & P. U. R. Co.* v. *United States*, 263 U. S. 528, 534, 535, 68 L. ed. 427 430, 431, 44 Sup. Ct. Rep. 194," (Our italics).

In *Crooks* v. *Harrelson*, 282 U. S. 55, 61, the Court stated—

> "Finally, the fact must not be overlooked that we are here concerned with a *tax act*, with regard to which the general rule *requiring adherence to the letter applies with peculiar strictness.* In *U. S.* v. *Merriam*, 263 U. S. 179, 187, 199 * * * *'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used"* (Our italics).

U. S. 245; *Crooks* v. *Harrelson,* 282 U. S. 55, 61).

Tax laws are to be interpreted liberally in favor of the taxpayer and doubts must be resolved against the Government. (*Miller* v. *Standard Nut Margarine Co.,* 284 U. S. 498, 508; *U. S.* v. *Merriam,* 263 U. S. 179, 187, 188; *Crooks* v. *Harrelson,* 287 U. S. 56, 61; *Iselin* v. *U. S.,* 270 U. S. 245). Executive construction cannot change the unambiguous language of a statute. (*Louisville & N. R. Co.* v. *U. S.,* 282 U. S. 740; *Norwegian Products Co* v. *U. S.,* 288 U. S. 494; *Alaska S. S. Co.* v. *U. S.,* 290 U. S. 256; *Bidde* v. *Commissioner of Internal Revenue,* 302 U. S. 573; *Haggar Co.* v. *Helvering,* 308 U. S. 389; post 340; *M. E. Blatt Co.* v. *U. S.,* 305 U. S. 267).

Since Congress has made clear that the Transportation Tax "shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company or similar person," and petitioner is not engaged in the business of transporting property for hire, or as a freight forwarder, express company, or similar person, but is "*engaged* in the business of owning and leasing trucks" (Cts. Fdg. No. 2, R. 34), it was not the intent of Congress nor the purpose of the Act to cover the whole field of service to every business enterprise which transported its own property, nor was it the purpose of the Act to permit the courts to inject into the Act other business enterprises made exempt by the Act, especially where the Act is now recognized as being contrary to the interest of the public, and is being attacked on grounds of recognized evil in our national economy, as shown below (*United States* v. *Silk,* 331 U. S. 711).[4]

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[4] "Since Congress has made clear by its many exemptions, such as, for example, the broad categories of agricultural labor and domestic service, 53 Stat. 1384, 1393, c. 666, 26 USCA 1940 ed. Sections 1426, 1607, 6A

Additional reasons why the Court should not in effect have held that petitioner is a transporter of property for hire, when petitioner transports no property for hire, thus enlarging beyond the clear import of the language contained in Section 3475 of the Internal Revenue Code, *supra*, are:

(a) ***The tax is against the best interest of the public and is opposed by the Treasury, and Agriculture Departments and the Interstate Commerce Commission, as being discriminatory, adding to the cost of production and supply, the cost of food, and more regressive over the middle and lower income ranges than most other existing Federal excise taxes.***[5]

FCA title 26, Sections 1426, 1607, that it was not its purpose to make the Act cover the whole field of service to every business enterprise, the sections in question are to be read with the exemptions in mind. The very specificity of the exemptions, however, and the generality of the employment definitions indicates that the terms "employment" and "employee," are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose" (331 U. S. at pp. 711, 712).

[5] See U. S. Department of Agriculture, Bureau of Agriculture Economics, June, 1949. The research on which this report is based was made possible by funds provided by the Agricultural research and Marketing Act of 1946.

Proponents of the Tax

"As far as could be determined no testimony whatsoever was presented on behalf of the tax in open hearing before the Congressional Committee" (Id. p. 27).

Opponents of the Tax

Mr. Morgenthau, *Secretary of the Treasury*, objected to the tax on transportation of property, as being a tax on freight and express which would add to the cost of production and supplying practically every commodity and service.

(*Id.*, p. 28; Revenue Act of 1942, Hearings before the Senate Committee on Finance, 77th Congress, 2nd Session, on H. R. 7378, page 7; See also letter from D. W. Bell, Acting Secretary of the Treasury, dated July 28, 1943, which stated—"Price and wage stabilization efforts, which are so crucial at this time, certainly are not helped by the tax and the amount of the net revenue obtainable from the levy does not appeal to offset its

4. The Court of Claims in holding that petitioner, in furnishing 14% of the drivers for its leased trucks, were petitioner's employees and the custodians of its property *while the trucks were in use on business for the customers,* and that petitioner's activities and business were substantially those of a contract carrier engaged in the business of transporting property for hire, are in conflict with the decisions of this Court, the Federal Courts, and the decisions of the Departments of the State of New York.

It is evident from the Special Findings of Fact of the Court of Claims that petitioner had no control over, or responsibility with respect to, the activities of the drivers carried on petitioner's payroll other than to serve as paying agents to them without profit for such services and as an accommodation to its customers. They were given no written instructions or general orders by the plaintiff as to the performance of any duties in plaintiff's interest while under the direction of plaintiff's customers. As a matter of practice, the duration of their tour of duty with the customer and the duties performed for such customers are the customer's

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likely undesirable effects." *Revenue Revisions of 1943*, Hearings before the House Committee on Ways and Means, 78th Congress, 1st Session on Revenue Revision of 1943, page 422.)

The Interstate Commerce Commission opposes the tax on transportation. 62nd Annual Report, November 1, 1948, page 9, as it "discriminates against long-haul shippers in reaching common markets in competition with short-haul shippers, and adds to the difficulties of for-hire carriers in their competition with private transportation by automobile, truck or vessel."

The Agricultural Report, June, 1949, names the various opponents of the tax, which are too numerous to list herein.

As stated in the above report, Note 24, page 26, — "It costs the trucking companies anywhere from 30 to 40 percent of the amount of the tax to collect it for the Government. When the Government is collecting taxes, if it costs more than 5 or 6 per cent. to collect it, it is considered a very expensive tax and it is therefore not considered a good tax."

"However, the tax on the transportation of property is probably more regressive over the middle and lower income ranges than most other existing Federal excise taxes • • •" (*Id.* p. 36).

sole concern, and no report of such activities is made to plaintiff. (Fdg. 14, R. 38) The drivers wear the uniforms of the customers. (Fdg. 11, R. 37) "At all times when the said motor vehicle or vehicles are in the service of the lessee and notwithstanding any chauffeur or helper shall be provided by the Lessor, the operation of the said vehicle or vehicles including the activities of such employees shall be under the sole direction and control of the lessee." (Fdg. 8, R. 36) Petitioner has no liability to its lessees for the safe transportation and delivery of their merchandise and commodities, as the Lessee holds the Lessor harmless for the acts of such drivers. (Fdg. 8, 36)[6] The only provision in the leases where petitioner furnishes drivers which gives petitioner the right to remove a driver is in Schedule B of the lease, as follows: "Upon receipt of a written complaint from the Lessee specifying any reckless, careless or abusive handling of a vehicle, or any other incompetence of any such chauffeur or helper, the Lessor shall remove such chauffeur or helper and substitute a competent one in his place." (Fdg. 8, R. 36) On the other hand, the lessee may remove the driver and truck from its service at any time by ordering the truck to return to the garage as both the driver and truck are "under the sole direction and control of the Lessee." (Schedule B of Lease, Fdg. 8, R. 36)

In conflict with the above Special Findings of Fact, the Court erroneously stated in its Opinion, that the drivers were petitioner's employees, and had "the exclusive right, limited only by the terms of its contracts with the Unions, to hire and discharge the drivers of the trucks, and it had, at all times, the general right of direction and control of its trucks and drivers." (Ct's. Op. R. 40)

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[6] The Special Findings of the Court of Claims are similar to those found in the case of *Walling, Acting Administrator of Wage and Hour Division, U. S. Department of Labor* v. *John J. Casale, Inc.*, 51 Fed. Supp. 520, in which the Court held that petitioner is not a carrier of property for hire.

As the Special Findings of Fact show that the lessee had the sole direction and control over the drivers and trucks while they were performing the services of transporting their property, the drivers were, *during that time, which is the only time involved herein,* the servants and employees of the lessees.[7]

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[7] *Standard Oil Co.* v. *Anderson,* 212 U. S. 215-221—"It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. * * * In many of the cases, the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relationship are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining *whose is the work and whose is the power of control* (Italics ours).

The relationship of master and servant may be expressed or implied; it is not essential that the name of the servant be on the payroll of the master, *Caraher* v. *Sears, Roebuck Co.,* 124 Conn. 409, 200 A. 324; there may be no compensation to the servant, *Baltimore & Ohio South Western Ry. Co.* v. *Burtch,* 263 U. S. 540, * * * *John Hancock Mutual Life Insurance Co.* v. *Dorman,* 108 F. 2d 220; or the compensation may be paid by a third person, not the master, *Green* v. *Samson,* 41 Fla. 94, 25 So. 332 * * * *Jones* v. *Gordon,* 179 F. 2d 176, 179.

In *U. S.* v. *Silk,* 331 U. S. 706, 716, the Court quoted with approval the following part of the decision in the lower court, 155 F. 2d 356—

"But even while they work for appellee they are not subject to his control as to the method or manner in which they are to do their work. The undisputed evidence is that the only supervision or control ever exercised or that could be exercised over the haulers was to give them the sales ticket if they were willing to take it, and let them deliver the coal. They were free to choose any route in going to or returning. They were not required even to take coal for delivery."

The court in the above case in footnote 8 page 714, quoted the pertinent portions of Treasury Regulation 90, promulgated under Title IX of the Social Security Act, Article 205 as follows:

"Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. . . .

The decision of the Court below is also in conflict with the decisions of this Court which have applied the "control and responsibility test" in determining as between lessor and lessee, who renders transportation service for compensation, and which have established that even the supplying of personnel to operate a rented vehicle is not the controlling criterion by which to determine, as between lessor and lessee, who is engaged in the transportation of property. (*U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, 86 L. ed 671, 62 S. Ct. 445; *Thomson v. U. S.*, 321 U. S. 19, 88 L. ed. 513, 64 S. Ct. 392; *Harrison v. Greyvan Lines, Inc*, 331 U. S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463.

Under the rule in *U. S. v. Silk*, 331 U. S. 704, as explained in *Bartels v. Birmingham*, 332 U. S. 129, 131, the lessees are the employers of the truck drivers, although their wages are advanced by petitioner and refunded by the lessees. In the above cases, the following elements determined the relationship of employer-employee,—

The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow in independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees." 26 CFR Sec. 400.205. See also Treasury Regulation 91. 26 CFR Sec. 401.3 (Emphasis added).

(a) "*Control*" over the employee while performing service. Here the lessees have "sole direction and control" over the drivers and the trucks at all times while transporting property. (Fdg. 8, Schedule B of Lease, R. 36, and Fdg. 14, R. 38).

(b) "*Dependent upon the business to which they render service.*" Here the drivers render only services for the lessee (Id.) The contracts with the Unions specify the lessee for whom they perform services. (Fdg. 13, R. 38, Plf's. Exs. 9 to 16 inc.) The drivers depend solely upon the named lessee on long-term leases for whom they formerly worked when the lessees owned their own trucks. (Fdg. 13, R. 38)

(c) "*Permanency of the relation, the skill required.*" Here the drivers are permanently employed, highly skilled drivers, who have worked for the lessees many years, (Id.)

(d) "Investment in the facilities for work." Although the original investment in the trucks is made by petitioner, it is the lessee who pays for the truck which bears the lessee's marking, and used solely by the lessee under its long-term lease. (Fdg. 11, R. 37; Plf's. Exs. 1 to 8, inc.). It is the lessee's business and investment and merchandise on which the driver makes a profit, and the driver's activities are confined to the named lessee (Fdg. 14, R. 38) and he and the truck are under the sole direction and control of the lessee, (Id. Fdg. 8, R. 36) whenever goods are transported therein.

Under the above facts it is evident that the relationship of employer-employee is between the drivers and the lessee and not between the driver and petitioner.

In the case of *Walling v. John J. Casale, Inc.*, 51 F. Supp. 520, Walling, the Act Administrator of Wage and Hour Division, United States Department of Labor, under authority of certain provisions of the Fair Labor Standards Act

of 1938, 29 U. S. C. A. sec. 201 et seq., asked injunctive relief against defendant for its alleged noncompliance with specified requirements of that statute, dealing with defendant's employees. It was found that defendant's employees were only those who worked in its twenty-two garages where defendant's trucks were serviced, cleaned, repaired and maintained in good working order, and defendant's office staff. That "Defendant's employees, aside from those performing executive functions and office duties, work merely as servicers of the trucks, that is to say, they grease, refuel, repair the vehicles and keep them in proper order for use by the lessees."

"During a period of about four hours per day, the trucks, for the purpose of servicing and repairs, are under defendant's exclusive custody and control. *At all other times they are under the direction of the lessees.* For the most part, the lessees employ and pay their own chauffeurs, but, in a number of instances, defendant, as part of its servicing activities, acts as an employment agent for the lessees in the way of hiring competent truck drivers and helpers to carry on the haulage for defendant's customers. In such case, defendant advances to its lessees the wages and employment insurance taxes of such employees, but is repaid such advances, without profit, upon the redemption of bills therefor. Defendant has no liability for the safe transportation and delivery of their merchandise and commodities. It issues no bills of lading and keeps no detailed records of what is transported in the trucks, or as to where the materials are picked up and delivered." "Obviously, I think, *defendant is not a common carrier* of property for hire. U. S. v. Rosenblum, 315 U. S. 50, 62 * * *." (page 524) Note: The word "common" carrier was a reporting error. The official opinion filed with the clerk reads * * * "is not a carrier of property for hire."

In the above case neither the government nor the court treated the drivers of the leased trucks as employees of defendant.

The decision of the court below is in conflict with *Ohio River Sand Co. v. Commissioner*, 60 F. Supp. 653 (W. D., Ky. 1945) and *Lyle v. United States*, 76 F. Supp. 787 (N. D., Ga., 1948).

The Court of Claims decision in holding that petitioner is engaged in the transportation of property for hire is in conflict with the decisions of the Public Service Commission of the State of New York, the State of New York, Department of Taxation and Finance decided June 13, 1947,[8] and

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[8] STATE OF NEW YORK

DEPARTMENT OF TAXATION AND FINANCE

Albany 1, N. Y., June 13, 1947.

Address your reply to Mr. Moody. File — 406 436.

Mr. John J. Casale, Inc.
510 West 21st Street
New York 11, N. Y.

GENTLEMEN:

From information now before the department, including that contained in your returns, and particularly your letter of June 5th, it would appear this corporation is properly taxable, and has been for some time, under Article 9-a, instead of as a transportation company under Sections 183 and 184 of Article 9, of the Tax Law.

Therefore, at this time, we request the completion and filing of franchise tax returns, under Article 9-a, for the tax years beginning November 1, 1942 to date.

Under separate cover we are forwarding blanks for the filing of these returns.

Very truly yours,

STATE TAX COMMISSION,
By: (signed) E. E. BURTON,
Director.

AK
Form 3-IT-1942 to 1944 incl.
3-CT-1945 to 1946 incl.
3-CT-1947 (4).

the Executive Department, Division of Alcohol Beverage Control, decided May 18, 1948.[9] Petitioner has not been licensed to transport property for hire by any government agency, State or Federal.

The Bureau of Internal Revenue issued rulings under dates of Sept. 23, 1942, March 18, 1944 holding that the drivers furnished by John J. Casale, Inc. to its lessees were the employers (R. 19). The Bureau reversed the above rulings by letter dated Dec. 17, 1945 (R. 19-24) (although the facts were the same and have continued the same up to the present time), and held that where peti-

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[9] State of New York
Executive Department

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

State Liquor Authority
270 Broadway, New York 7

May 18, 1948.

John J. Casale, Inc.
510 West 21st Street
New York 11, N. Y.

GENTLEMEN:

Your letter dated December 4, 1947 and the letter of your attorney, Irwin D. Davidson, Esq., dated January 26, 1948, relative to the operation of vehicles leased to manufacturers and wholesalers of alcoholic beverages was submitted to and considered by the Members the Authority at a meeting held on May 14, 1948.

I have been directed to advise you that the Authority has ruled that under the circumstances set forth in your letter, such vehicles need not be registered with the Liquor Authority by a trucking permit issued under Section 94 of the Alcoholic Beverage Control Law.

However, each manufacturer and wholesaler who hires and operates such a vehicle must comply with all the provisions of the law regarding signs and other regulations governing the operation of vehicles owned or hired and operated by such licensees for the trucking or transportation of alcoholic beverages.

Very truly yours,

STATE LIQUOR AUTHORITY,
ALVIN MCKINLEY SYLVESTER,
Counsel.

MR:CD.

tioner furnishes drivers without cost to petitioner for 14% of its leased trucks, it is engaged in the business of transporting property for hire, but not where 86% of the drivers for the leased trucks are funished by the lessees (R. 33, 34, 35).

In *Bridge Auto Renting Corporation et al.* v. *Patrick,* 174 F. 2d, 733, the Court upheld the Bureaus ruling as set out above, which the Court of Claims followed in the case at bar, although the facts clearly distinguish the two cases. In the *Bridge* case plaintiff,

> "(a) Carried theft insurance when requested by the lessee, which is not the case here, and
>
> "(b) Plaintiff was not held harmless under the lease for acts of its drivers it provided for the lessee, for breakage, damage, spoilage, loss or theft of merchandise, including improper or erroneous delivery thereof, damage resulting from installation of merchandise, or to property at the place of delivery or pick-up thereof, etc., as provided under the leases herein (R. 36), and
>
> "(c) There was no provision there, as here, that "At all times when said motor vehicle or vehicles are in the service of the Lessee and notwithstanding chauffeur or helper shall be provided by the Lessor, the operation of said vehicle or vehicles * * * shall be under the sole direction and control of the Lessee," as provided in Schedule B of the leases herein (R. 36) and
>
> "(d) There was no agreement there, as here, that, "Upon receipt of a written complaint from the Lessee specifying reckless, careless or abusive handling of a vehicle or any other incompetence of any such chauffeur or helper the Lessor shall remove such chauffeur and substitute a competent one in his place" (R. 36), or that
>
> "(e) Inability on the part of the Lessor to provide chauffeurs and/or helpers required shall in no wise

vitiate this agreement nor shall the Lessor incur any liability for such failure to provide" (R. 36), or that,

> "(f) The lessees shall pay to the lessor weekly 8% of the amount of the wages advanced by the lessor as an advancement for taxes to be paid by the lessor for its lessees for Unemployment Insurance and for Old Age Benefits, etc. (R. 36, 37) "There, an examination of the Record (Rec. pp. 126-127) shows that that company employed dispatchers and highway inspectors to check on the conduct of the drivers who were subject to disciplinary actions for violations and reckless driving. Here, no such dispatchers or inspectors check on the conduct of the drivers nor does plaintiff subject the drivers to disciplinary actions for violations and reckless driving."

The *Bridge* case, *supra,* was before Judges Hand, Chase and Clark. Judge Clark dissenting. Judge Chase writing the opinion stated,

> "The rather complicated nature of the relation of the appellant to the operation of its 'Leased' trucks makes the solution difficult and, as is so often true of close cases, the correct result depends upon where the emphasis correctly should be put" (page 734).
>
> "* * * While we realize that the circumstances must control in each case and that in doubtful ones the final decision is the only 'right' one, we hold for the reasons above stated that the decision below was not erroneous" (page 738).

Judge Clark, dissenting, stated:

> "Appellant seems to me to be so completely in the business of renting trucks, rather than 'or transporting property for hire' that I do not believe the decision below should stand * * *" (page 738).

As stated above that case was close, and decided on the facts involved therein where there were many material facts

absent but present in this case as set out above, and of sufficient importance had they been present in the *Bridge* case, *supra,* to have influenced that Court to have decided for the plaintiff. Even there the Court held,

> "• • • we shall make no attempt to support the judgment by tagging the appellant a contract carrier" (page 737).

5. The decision of the court below is inequitable, onerous and against the interest of the public as shown above.

Petitioner is engaged in the business of owning and leasing approximately 1,300 trucks to commercial concerns who use the trucks solely for the transportation of their goods, and in no case for the transportation of property for hire. Petitioner services these trucks and keeps them in repair, and as an accommodation furnishes drivers for 14% of the trucks for which the lessees pay the wages without cost to petitioner, as petitioner is reimbursed for the wages it advances. The decision of the court below extends the scope of the tax to activities which in and of themselves, are non-taxable, solely by reason of the fact that the petitioner performed gratuitously, a disbursing service on behalf of the lessees, non-transporters of property for hire. The court below, by deciding that any payment made by the lessee of a motor vehicle to the lessor in addition to the rent is sufficient to bring the lessor within the classification of a person engaged in the business of transporting property for hire, even if such payment is only incidental to a minor part of lessor's total operation and constitutes reimbursement without profit, defeats the intent of Congress to tax only such transportation as is performed for compensation. That the petitioner had no purpose to profit, and did not in fact profit, from the optional and incidental payroll service for 14% of the drivers for the lessees is clear from the

Special Findings of Fact (Fdgs. 8, R. 36, 37, and Fdg. 12, R. 37, 38).

Under the regulatory laws of the State and Federal Governments applicable to motor carriers, if the erroneous decision below is permitted to stand, petitioner will be subjected to claims for freight tariffs which carriers must file with those public administrative bodies; bills of lading must be issued; particular kinds of records must be kept, including the weighing of freight and the marking of packages; the transportation charges are required to be published and paid upon the basis of the quantities of transportation services rendered rather than for shippers to use the trucks as little or much and at whatever times they may so please; and the shippers may not have their distinctive decorations, trade names and other advertising labels or insignia upon the trucks. If, under the decision of the court below, petitioner is required to register with the Internal Revenue Department as a "Transporter of Property for Hire", petitioner will receive the 3% transportation tax, but not the 30 to 40% of the amount of the tax required to collect it for respondent (Agricultural Report, *supra,* page G-9, note 5) which 30% will represent an actual loss to petitioner.

Conclusion

Under Special Findings of Facts of the Court of Claims, petitioner is so completely in the business of leasing its trucks, transporting no property for hire, that the decision below should not stand. Admittedly that is so far true of some 86% of the trucks it leases that as to that there is not even a claim of taxability. As to the rest, the unpaid services in looking after some minor details of the personnel while the trucks are idle and not being used for transporting property, due to petitioner's ability to make arrangements with the unions for the lessee-employer, do not change the

essential significance of the final control over the operations of the trucks left with petitioner's lessees. It is to be noted that the payments were based entirely upon the time-mileage use of the trucks which bear the lessee's markings, not upon carriage of specific goods, where the lessees hold petitioner harmless for the acts of the drivers including the loss of the goods. This was significant to show nontaxability as to 86% of the business; it should not be overlooked as to the small balance. Further there is surely an anomaly, contrary to the clear language of the Transportation Act, in holding that this small gratuitous service for this limited group of lessees renders the entire service as to them, renting and all, completely taxable.

For the reasons stated, it is respectfully submitted that this petition should be granted.

R. H. McNeill,
T. Bruce Fuller,
815 15th Street, N. W.,
Washington 5, D. C.,
Counsel for Petitioner.

December —, 1949